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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-950

WOODROW MEGEL AND LOLA MEGEL,
Petitioners,

vs.

CITY OF PAPILLION, LYNN LANDGREN, MAYOR, AND ROBERT A. WALLACE, IDA MAE CHADWICH, LOUIS HAUSCHILD, JR., MAURICE MORAVEC, WILLIAM OLIVER, JR., FRANK ARNEY, FRANK SMITH, ALLEN RIBBE, COUNCILMEN,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nebraska

REPLY OF PETITIONERS TO "MEMORANDUM FOR RESPONDENTS IN OPPOSITION"

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"Memorandum for Respondents in Opposition" is not supported by constitutional provisions and law as to any assertion of law, and it is also erroneous in statements of facts.

I. Respondents state: "Petitioners are the owners of *a residential dwelling in the City of Papillion* * * *" (#1, p. 1, their Memorandum in Opposition. Italics added). Two glaring errors exist in such statement:

a. The Decree of January 7, 1971 and the Opinion of the Nebraska Supreme Court both establish that Petitioners own Tax Lots 7 and 8 (Petition for Writ of Certiorari to the Supreme Court of Nebraska: par. 2 at p. 35, & p. 51). The facts are that the residence of Petitioners is on Tax Lot 7 as established by the evidence, and which is indicated in the Decree of January 7, 1971 in the finding regarding the "* * * rain on June 16, 1964, which damaged the property and residence of the Plaintiffs * * *, the residence being known as 314 West Lincoln Street * * *" (par. 8, p. 38, Petition for Certiorari herein). Respondents are not correct in submitting that there is "a residential dwelling" as being the property of the Petitioners.

b. Respondents state the property of Petitioners is "*in* the City of Papillion, Nebraska". Petitioners state "Their real estate *abuts* the City of Papillion" (p. 6, Petition for Writ of Certiorari herein). The correctness of Petitioners is in part established by:

1. The Decree of January 7, 1971 denied and dismissed with prejudice the Petition of the City of Papillion to *annex* said property of Petitioners (pars. 12 & D of Decree at pp. 40, 42, Petition for Writ of Certiorari herein).

2. The Opinion of the Supreme Court of Nebraska states "The plaintiffs are the owners of Tax Lots 7 & 8 which are *adjacent* to the City of Papillion, Nebraska" (p. 51, Petition for Writ of Certiorari herein. Italics added).

II. Respondents state (#2, p. 2, Memorandum for Respondents in Opposition) that "* * * trial courts determined that the discharge on Petitioners' property was wrongful but that no damages were incurred".

Respondents are in error in therein stating "* * * but that no damages were incurred" by Petitioners from the wrongful discharge of Respondents. Decree of January 7, 1971 finds and determines:

1. Generally for plaintiffs, now Petitioners, "except as to insufficient proof of dollar amount of damages" (par. 1, p. 35, Petition for Writ of Certiorari herein).

2. The construction and installation by Respondents during the period of 1950 to 1962 inclusive, gathers "* * * in large and unusual quantities * * *" the surface water and precipitates it upon the property of Petitioners and *in part finds it is Respondents'* "* * * *duty* * * * *to use ordinary care and all reasonable means to take care of the water it had accumulated and is accumulating* so as not to injure or damage the property of the plaintiffs * * * or interfere with said plaintiffs and their property * * *" (par. 5 at pp. 36-37, Petition for Writ of Certiorari herein). (Italics added.)

3. "That the evidence is insufficient for determination by the Court with any degree of accuracy the dollar amount of damages to the Plaintiffs * * * heretofore caused by such precipitation of surface water upon their property prior to the heavy rains of June 16, 1964 and at the evidence relative to the dollar amount

of damages of said plaintiffs was too conjectural, uncertain, speculative and remote and was not proved with reasonable certainty." (Par. 6, pp. 37-38, Petition for Writ of Certiorari herein).

4. "That competent evidence * * * does establish that the plaintiffs did sustain some continuing damages by surface water as the result of said construction and installation by and in behalf of the defendants * * *", and "* * * equity looks to the nature of the continuing damages inflicted * * *" (par. 7, p. 38, Petition for Writ of Certiorari herein).

5. "That the rain on June 16, 1964, which damaged the property and residence of the plaintiffs * * *" (par. 8, pp. 38-39, Petition for Writ of Certiorari herein).

6. Respondents "* * * should be ordered to construct or cause to be constructed suitable and appropriate facilities, improvements and outlets to cause the surface water to be disposed of in a manner other than upon, in or through the property of plaintiffs * * * and in a manner that no damage be caused to the property of said plaintiffs and to said plaintiffs * * *" (par. 11, pp. 39-40, Petition for Writ of Certiorari herein), and the Decree so Orders the Respondents (pars. B, E, pp. 42-43, Petition for Writ of Certiorari herein).

The Opinion of the Supreme Court of Nebraska states the Decree also orders Respondents "* * * to construct facilities within 6 months to cause the surface waters to be disposed of other than through the property

of Plaintiffs and 'in a manner so that no damage be caused to the property of said plaintiffs and of said plaintiffs' " and states "The plaintiffs alleged the defendants had failed to comply with the decree and had authorized additional construction in the City of Papillion which had materially increased the flow of surface water across the plaintiffs' property" (pp. 51-52, Petition for Writ of Certiorari herein).

It is clear error, contrary to facts and the adjudications, for Respondents to state "no damages were incurred" when Petitioners have been and continue to be damaged, but were denied specific damages sought as to any specific damages pleaded. Statement by Respondents in their #2 is unequivocally erroneous. (See **also** pp. 6-9 Petition for Certiorari herein.)

III. Respondents assert (#4, p. 2, their Memorandum) that "the City Council * * * determined that the only feasible manner of correcting the water problem was to condemn the Petitioners' property or a portion of it." Constitutional provisions and jurisprudence thereunder do not permit a City Council and its personnel to substitute their determination of "feasibility" or compliance when there is a binding and final Order and Decree of the duly constituted Court as to the duties, requirements and conduct required and ordered by the Court. Such substitution is anarchy and lack of due process prohibited by the Constitution of the United States, as well as by the Constitution of the State of Nebraska, presently not applied herein requiring the action and orders of this Court. In addition, such statement in the Memorandum

for Respondents is not in accord with the facts, nor in accord with the findings and determinations of the District Court or of the Supreme Court of Nebraska. If Respondents wished to question the Decree of January 7, 1971 as not "feasible" in their opinion, their duty was to appeal in due course of law, which they did not do, instead of accepting the Decree as final and binding upon them. Also, the evidence and facts do not support the statement of Respondents that "the only feasible" manner is as decided by the City Council. The Supreme Court of Nebraska in part states: "The defendants do not attempt to justify their failure to comply with the decree of January 7, 1971, on the ground that compliance was impossible. * * * There is no satisfactory explanation in the record as to their failure to comply with the Decree before December 20, 1971. The defendants seem to have been more concerned with the expense involved in remedying the wrongful diversion of surface waters than in complying with the decree and affording the plaintiffs the relief to which they are entitled." (Opinion of Supreme Court of Nebraska, at p. 53 of Petition for Writ of Certiorari herein). Testimony in the Bill of Exceptions before the Supreme Court of Nebraska by the representative of the consulting engineers of Respondents is that engineering-wise storm sewers can be constructed to carry the surface water away from and around Petitioners' property herein involved.

In ordering Respondents to construct the facilities as provided therein, the Decree establishes that the trial court's basis is "ordinary care and reasonable means" (#2, p. 3, supra).

The construction ordered by the Decree is judicially determined as feasible and appropriate, and constitutionally there may be no substitution of Judgment by Respondents as to the adjudicated and judicially binding requirements and orders of the Decree.

IV. Petitioners are before this Court for the constitutional violations in the failure of Nebraska Courts to enforce the binding and final Decree of January 7, 1971. Respondents fail to submit a single constitutional or legal reference in opposition to the established reasons and requirements which establish the imperative and essential necessity for consideration and determination of this matter by this Honorable Court as set forth in the Petition for Writ of Certiorari, and particularly as set forth in the nine Reasons for Allowing the Writ at pages 11 through 31 of said Petition for Writ of Certiorari and the relevant appendices.

Wherefore, the Petition for Writ of Certiorari herein and its prayer are by reference reiterated and submitted as applicable and controlling.

Respectfully submitted,

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